Federal Court of Appeal | Cour d'appel fédérale

Date: 20250117

Docket: A-80-24

Citation: 2025 FCA 8

CORAM: **GLEASON J.A.**
GOYETTE J.A.
BIRINGER J.A.

BETWEEN:

PRECIOUS KASEKE

Applicant

and

TORONTO DOMINION BANK

Respondent

Heard at Toronto, Ontario, on October 30, 2024.
Judgment delivered at Ottawa, Ontario, on January 17, 2025.

REASONS FOR JUDGMENT BY: GOYETTE J.A.
CONCURRED IN BY: GLEASON J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

I. Introduction

[1] Ms. Precious Kaseke seeks judicial review of the Canada Industrial Relations Board's decision dated October 3, 2023 whereby the Board declined to consider her unjust dismissal complaint: 2023 CIRB 5145.

[2] As a starting point, it bears noting that Ms. Kaseke's application may be out of time. To support a finding of lateness by this Court, the Toronto Dominion Bank is requesting leave to adduce new evidence. It is not necessary to rule on the Bank's request. Even if timely, Ms. Kaseke's application for judicial review cannot succeed.

II. Context

[3] Ms. Kaseke filed a complaint pursuant to subsection 240(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2. In it, she alleges that she was constructively dismissed by the Bank as a result of age and race-based discrimination and harassment. Her complaint was referred to the Board.

[4] Some six months after Ms. Kaseke filed her complaint, the Board wrote to the parties regarding paragraph 242(3.1)(b) of the Code. This paragraph provides that no complaint shall be considered by the Board if a procedure for redress has been provided under any other Act of Parliament. The Board informed the parties that when an unjust dismissal complaint raises allegations of discrimination, there is a possibility that the Board will find that there is a procedure for redress under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 and dismiss the complaint on the basis that the proper forum is the Canadian Human Rights Commission. At the Board's invitation, the parties made submissions regarding the Board's jurisdiction. The Board considered the submissions and declined to consider Ms. Kaseke's complaint.

III. Standard of review

[5] Decisions concerning the jurisdictional lines between two or more administrative bodies must be correct: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 [*Horrocks*] at paras. 7–9; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 53. For the reasons below, I am of the view that the Board's decision that paragraph 242(3.1)(b) of the Code barred it from considering Ms. Kaseke's complaint was correct. Thus, there is no basis for this Court to intervene: *Horrocks* at para. 7; *Vavilov* at para. 64.

IV. Analysis

A. *The Board's decision*

[6] To resolve the jurisdictional contest between itself and the Canadian Human Rights Commission, the Board engaged in a two-step analysis analogous to the analysis that the Supreme Court undertook in *Horrocks* at paras. 39–40.

[7] First, the Board examined the relevant legislative provision—paragraph 242(3.1)(b) of the Code—to determine to whom it grants jurisdiction and over what matters. Relying on the mandatory wording of this paragraph and its interpretation (particularly in *MacFarlane v. Day & Ross Inc.*, 2010 FC 556 [*MacFarlane*] at paras. 71, 73–74), the Board found that when the *Canadian Human Rights Act* provides a procedure for redress in respect of a complaint, the Canadian Human Rights Commission has primary jurisdiction. It is only if the Commission

exercises its statutory discretion under the *Canadian Human Rights Act* to refer the matter back to the Board that the latter has jurisdiction.

[8] Second, the Board determined that the dispute between Ms. Kaseke and the Bank falls within the scope of the Commission's jurisdiction. In this connection, the Board carefully reviewed the complaint and found that human rights allegations lay at the core of Ms. Kaseke's complaint. The Board further found that these allegations could reasonably constitute a basis for a substantially similar complaint under the *Canadian Human Rights Act*. As a result, the Board declined to consider Ms. Kaseke's complaint.

B. *This Court's jurisprudence supports the Board's decision*

[9] The Board's interpretation of paragraph 242(3.1)(b) of the Code is in line with the jurisprudence from this Court going back five decades.

[10] Decided in 1974, *Re Cooper and the Queen*, [1974] 2 FC 407 (FCA) [*Re Cooper*] involved section 31 of the *Public Service Employment Act*, R.S.C. 1970, c. P-32. Under that section, the deputy head of a ministry had the power to recommend to the Public Service Commission the release of an employee who was incompetent or incapable of performing the duties of the position they occupied. The section further provided the employee with a right of appeal to the appeal board against the recommendation. The deputy minister of the ministry where Mr. Cooper worked recommended that the latter be released from his employment because he was incapable of performing the duties of the position he occupied. Mr. Cooper appealed the recommendation to the appeal board. After the appeal board dismissed his appeal,

Mr. Cooper filed a grievance for disciplinary discharge under a different statute—the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35. Subsection 90(1) of that statute, worded in terms practically identical to those of paragraph 242(3.1)(b) of the Code, provided that a grievance could not be presented if it related to a matter in respect of which an "administrative procedure for redress is provided in or under an Act of Parliament". This Court found that the right of appeal in subsection 31(3) of the *Public Service Employment Act* constituted an administrative procedure for redress with the consequence that no grievance could be presented for adjudication. In the words of this Court, the appeal board was the "tribunal endowed by Parliament" to deal with this employment matter: *Re Cooper* at 412–413.

[11] Similarly, in another decision, this Court concluded that subsection 90(1) (by then subsection 91(1) of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35) prevented an employee from presenting a grievance under that Act because the *Canadian Human Rights Act* sets out an administrative procedure for redress in respect of grievances relating to human rights: *Canada (Attorney General) v. Boutilier*, [2000] 3 FC 27 (FCA) [*Boutilier*].

[12] I note that the *Public Service Staff Relations Act* is the predecessor of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2. Subsection 208(2) of the latter bars the presentation of a grievance "in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*". Parliament's decision to amend the legislation does not alter this Court's constant interpretation—more on that below—according to which the phrase "in respect of which an administrative procedure for

redress is provided under any Act of Parliament" confers primary jurisdiction to the tribunal empowered under any other Act of Parliament.

[13] Paragraph 242(3.1)(b) is found in Part III of the Code. Part III contains provisions that set out employment conditions, including rights on termination of employment. One of these provisions, section 240, permits a person who has been dismissed and considers the dismissal to be unjust to file a complaint. Subsection 242(3) provides that the Board will consider the complaint. However, paragraph 242(3.1)(b) of the Code limits the Board's jurisdiction. It reads:

Limitation on complaints	**Restriction**
(3.1) No complaint shall be considered by the Board under subsection (3) in respect of a person if	**(3.1)** Le Conseil ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
…	[…]
(b) a procedure for redress has been provided under Part I or Part II of this Act or under any other Act of Parliament.	**b)** les parties I ou II de la présente loi ou une autre loi fédérale prévoient un autre recours.

[14] Not surprisingly, when tasked with the interpretation of paragraph 242(3.1)(b) of the Code, this Court arrived at the same conclusion as it had in *Re Cooper* and *Boutilier* regarding subsection 90(1) of the *Public Service Staff Relations Act*.

[15] For instance, in *Byers Transport Ltd. v. Kosanovich*, 1995 CanLII 3515 (FCA), [1995] 3 FC 354 (leave to appeal to SCC refused, 24944 (21 March 1996)) [*Byers*], this Court ruled that paragraph 242(3.1)(b) ousts the Board's jurisdiction to hear an unjust dismissal complaint pursuant to subsection 242(3) when there is evidence that a complainant's employment was

eliminated because of her perceived support for unionization. This is so because section 97, found in Part I of the Code, provides that a person may make a complaint of an unfair labour practice. This Court determined that the right to make a complaint under Part I of the Code constitutes a "procedure for redress" within the meaning of paragraph 242(3.1)(b). A parallel conclusion was reached in *Joshi v. Canadian Imperial Bank of Commerce*, 2015 FCA 105 (leave to appeal to SCC refused, 36440 (24 September 2015)) [*Joshi*] where this Court considered a discrimination complaint under the *Canadian Human Rights Act* to be another procedure for redress. It should be emphasised that it is the availability of another procedure for redress that bars the Board's jurisdiction, not whether a complaint has been filed seeking to access that other procedure: *Macfarlane* at para. 73.

[16] The above makes clear that paragraph 242(3.1)(b) confers on the Canadian Human Rights Commission primary jurisdiction to consider an unjust dismissal complaint that raises allegations of discrimination.

C. *Ms. Kaseke's arguments*

[17] Ms. Kaseke resists this conclusion, essentially relying on three arguments.

(1) The Board failed to consider relevant jurisprudence

[18] Ms. Kaseke's first argument is that the Board failed to consider the jurisprudence that she brought to its attention. According to her, this jurisprudence addresses the characterisation of the dispute, and Parliament's intention regarding paragraph 242(3.1)(b) in a way that supports a

finding that her complaint is within the Board's jurisdiction despite the human rights allegations embedded in it.

[19] I disagree.

(a) *The Vaid decision*

[20] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30 [*Vaid*], Mr. Vaid complained to the Canadian Human Rights Commission. Mr. Vaid alleged that the Speaker of the House of Commons had constructively dismissed him as his chauffeur for reasons that amounted to workplace discrimination and harassment under the *Canadian Human Rights Act*. Despite the fact that Mr. Vaid's complaint involved human rights allegations of discrimination and harassment, the Supreme Court ruled that the complaint had to be dealt with under the grievance procedure established under the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.), and not by the Canadian Human Rights Commission.

[21] Ms. Kaseke argues that since her factual matrix is akin to that of Mr. Vaid, this Court should conclude that the Board, and not the Canadian Human Rights Commission, has jurisdiction to consider her complaint. In support of her argument, Ms. Kaseke refers to the Supreme Court's observation that allegations of human rights violations "[do] not automatically steer the case to the Canadian Human Rights Commission because 'one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute'": *Vaid* at para. 93. However, this comment must be read in light of the Supreme Court's decisive finding that the *Parliamentary Employment and Staff Relations Act* (PESRA)—which applied to Mr. Vaid's

employment—creates an exclusive regime governing the labour relations of parliamentary employees: *Vaid* at paras. 83, 95. More specifically, "[s]ection 2 of PESRA indicates that, where other federal legislation deals with 'matters similar to those provided for under [PESRA]' […] PESRA prevails": *House of Commons v. Dupéré*, 2007 FCA 180 at paras. 5, 7. Put another way, section 2 of PESRA provides for a result opposite to that of paragraph 242(3.1)(b) of the Code by ousting the Canadian Human Rights Commission's jurisdiction to hear the complaint. It follows that *Vaid* does not support Ms. Kaseke's position.

(b) *The Horrocks decision*

[22] Ms. Kaseke relies on another Supreme Court decision: *Horrocks*. Ms. Horrocks was a unionized employee who, like Ms. Kaseke, made a complaint for unjust dismissal that raised allegations of discrimination. Nonetheless, the Supreme Court concluded that Ms. Horrocks's complaint had to be addressed by a labour arbitrator to whom *The Labour Relations Act*, C.C.S.M., c. L10 gave exclusive jurisdiction with respect to the final settlement of disputes arising from a collective agreement. The Supreme Court found no expression in the Manitoba human rights legislation of the legislator's intention to displace the labour arbitrator's exclusive jurisdiction so as to confer concurrent jurisdiction on the Manitoba Human Rights Commission: *Horrocks* at paras. 32, 43–46.

[23] Like *Vaid*, the Supreme Court's decision in *Horrocks* involved a legislative provision that calls for a result contrary to that of paragraph 242(3.1)(b) of the Code. Accordingly, it cannot support the outcome sought by Ms. Kaseke.

(c) *The Wilson decision*

[24] Finally, Ms. Kaseke relies on *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 [*Wilson*]. More precisely, on the Supreme Court's finding that Parliament enacted Division XIV of Part III of the *Canada Labour Code* to level the playing field between non-unionized and unionized federal employees by allowing non-unionized employees to file complaints for unjust dismissal: *Wilson* at paras. 43–44, 47, 49, 67. Ms. Kaseke argues that since she chose to do what Parliament intends non-unionized federal employees like her to do—file a complaint for unjust dismissal—this Court should not impose a different procedure on her.

[25] However, Parliament's general intention in enacting the unjust dismissal provisions cannot prevail over the clear and mandatory text of paragraph 242(3.1)(b)—the sole provision at issue. This text is the anchor of the interpretative exercise: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 24. Paragraph 242(3.1)(b) confers primary jurisdiction on the Canadian Human Rights Commission in relation to non-unionized federal employees' complaints of unjust dismissal that could be adjudicated under the *Canadian Human Rights Act*. Although the Board is not precluded from considering human rights issues that lie at the heart of an unjust dismissal complaint, the Board can only consider such a claim if the Canadian Human Rights Commission refers the complaint back to the Board pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*: *MacFarlane* at paras. 74–75. In the absence of a referral from the Commission, the Board has no jurisdiction to consider the complaint: *Joshi* at para. 17.

(2) The prejudice suffered by Ms. Kaseke

[26] Ms. Kaseke's second argument relates to the prejudice that she suffers from having to file a complaint with the Canadian Human Rights Commission long after she complained to the Board.

[27] The Board correctly found that the mandatory wording of paragraph 242(3.1)(b) ("shall"/"ne peut") and its interpretation in the jurisprudence gave it no discretion to relieve Ms. Kaseke from the application of that paragraph in order to hear her complaint: *MacFarlane* at para. 71.

[28] In any case, Ms. Kaseke could have avoided the predicament in which she finds herself.

[29] Ms. Kaseke filed her complaint for unjust dismissal on April 30, 2021. On November 4, 2021, the Board wrote to the parties regarding paragraph 242(3.1)(b) of the Code and its impact on the Board's jurisdiction. In my opinion, the Board informed Ms. Kaseke in a timely manner of the jurisdictional issue. While awaiting the Board's decision on this issue, Ms. Kaseke could have filed a complaint with the Canadian Human Rights Commission within the one-year time period provided by paragraph 41(1)(e) of the *Canadian Human Rights Act*, thereby avoiding the prejudice she now alleges. In doing so, and no matter the Board's ultimate decision, not only would Ms. Kaseke have acted within the *Canadian Human Rights Act* time limit, but she would have also been in a position to seek to persuade the Canadian Human Rights Commission to refer

her complaint back to the Board on the basis that the matter could be more appropriately dealt with in a hearing before the Board: *MacFarlane* at para. 74; *Joshi* at para. 5.

(3) The absence of real redress

[30] Ms. Kaseke's third argument is one that she made before the Board: all the remedies that she is seeking are not available to her under the *Canadian Human Rights Act.* The Board found that this argument could not be entertained given the jurisprudence on this issue. I share the Board's conclusion.

[31] In *Byers*, this Court held that for the purpose of determining whether a procedure for redress has been provided elsewhere within the meaning of paragraph 242(3.1)(b), that procedure does not have to yield exactly the same remedies as those available pursuant to Part III of the Code. Rather, the other procedure must be capable of producing some real redress which could be of personal benefit to the complainant: *Byers* at para. 39. Likewise, in *Boutilier*, this Court held that while another procedure for redress must be a "real remedy", it "need not be an equivalent or better remedy as long as it deals 'meaningfully and effectively with the substance of the employee's grievance'": *Boutilier* at para. 23.

[32] Before this Court, Ms. Kaseke argues that the *Canadian Human Rights Act* is not a real remedy or redress, because unlike Part III of the Code it will not "make her whole".

[33] There is no denying that the "make whole" philosophy—ordering remedies intended to put the unjustly dismissed employee in the position they would have been in had there been no

unjust dismissal—underlies Part III of the Code: Geoffrey England, *Individual Employment Law*, 2nd ed. (Toronto: Irwin Law, 2008) [England] at 383; *Murphy v. Canada (Adjudicator, Labour Code) (C.A.)*, 1993 CanLII 3009 (FCA), [1994] 1 FC 710 at 722. For a recent example, see *Amer v. Shaw Communications Canada Inc*., 2023 FCA 237.

[34] But the "make whole" philosophy is not unique to Part III of the Code. One objective of the *Canadian Human Rights Act* is to make whole a claimant's economic losses and psychological harm suffered due to the violation of their human rights by restoring the claimant to the position they would have been in had the unlawful discrimination not occurred: England at 255; Peter Newman and Jeffrey Sack, "eText on Wrongful Dismissal and Employment Law" (October 2024) at ch 13.2.2, online: (CanLII) Lancaster House. According to one author, the make whole approach under the *Canadian Human Rights Act* has much in common with the make whole approach under the Code: England at 257. In this connection, I note that section 53 of the *Canadian Human Rights Act* grants broad remedial powers to the Canadian Human Rights Tribunal when it institutes, at the Canadian Human Rights Commission's request, an inquiry into a complaint. Section 53 allows the Tribunal to order the employer to:

- cease the discriminatory practice and take steps to prevent the practice from happening in the future (paragraph 53(2)(a));
- make available to the complainant the rights, opportunities or privileges that were denied such as reinstating the complainant to their position (paragraph 53(2)(b));
- compensate the complainant for any or all of the wages that the complainant was deprived of and for any expenses incurred by the complainant as a result of the discriminatory practice (paragraph 53(2)(c));

- compensate the complainant for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the complainant as a result of the discriminatory practice (paragraph 53(2)(d));
- compensate the complainant, by an amount not exceeding $20,000, for any pain and suffering that the complainant experienced as a result of the discriminatory practice (paragraph 53(2)(e)); and
- pay the complainant up to $20,000 if the discrimination was wilful or reckless (subsection 53(3)).

[35] Section 53 also allows the Tribunal to award interest on an order to pay financial compensation (subsection 53(4)).

[36] In this context, I am of the view that while the remedies available under the *Canadian Human Rights Act* may not be exactly the same as those under Part III of the Code, they are quite similar. More importantly, the remedies available under the *Canadian Human Rights Act* at the relevant time would have provided Ms. Kaseke a possibility of real redress.

V. Conclusion

[37] In light of the above, I am of the view that the Board made the correct decision. I would therefore reject the application for judicial review, with costs that I would fix in the all-inclusive amount of $1,500.

"Nathalie Goyette"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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